

FACTUAL HISTORY

This is the third appeal in this case. In the first appeal,² the Board issued a decision on November 2, 2005 affirming the Office's determination that appellant did not establish that he sustained a recurrence of disability on or after June 15, 2002 due to his August 23, 2001 employment injury.³ The Board also affirmed the Office's denial of appellant's January 2005 request for further review of the merits of his claim. In the second appeal,⁴ the Board issued a decision on July 3, 2006 in which it affirmed the Office's denial of appellant's February 2006 request for reconsideration. The facts and the circumstances of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

In January 2007, appellant requested reconsideration of his claim. He resubmitted a January 10, 2003 report of Dr. James E. Elbaor, an attending Board-certified orthopedic surgeon, and submitted a new report from Dr. Elbaor dated January 5, 2007. In the January 10, 2003 report, Dr. Elbaor noted that appellant complained of left foot pain and diagnosed left hallux rigidus. On January 5, 2007 he stated that he first saw appellant on October 2, 2002 for "an on-the-job injury to his great left toe" at which time his diagnosis was "trauma left foot, rule out tarsal tunnel syndrome." Dr. Elbaor noted, "After examining [appellant] on January 10, 2003 his diagnosis had changed to hallux rigidus of the left toe. All of his diagnoses are stated in the chart."

In an April 20, 2007 decision, the Office denied appellant's request for further review of the merits of his claim. The Office determined that the evidence was either repetitious or irrelevant to the issue of the claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁵ the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁶ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁷ When a claimant fails to meet one of the above standards, the

² Docket No. 05-1437 (issued November 2, 2005).

³ On August 23, 2001 appellant, then a 51-year-old postal clerk, sustained a left foot contusion when he was getting ice out of a machine and the door fell on his left foot. On November 6, 2001 he returned to performing regular duty for the employing establishment. Appellant claimed that beginning June 15, 2002 he sustained a recurrence of disability due to his August 23, 2001 employment injury.

⁴ Docket No. 06-821 (issued July 3, 2006).

⁵ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ 20 C.F.R. § 10.607(a).

Office will deny the application for reconsideration without reopening the case for review on the merits.⁸ The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record⁹ and the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

ANALYSIS

The Office accepted that appellant sustained a left foot contusion on August 23, 2001, but denied his claim that he sustained a recurrence of disability on June 15, 2002 due to his August 23, 2001 employment injury. In an April 20, 2007 decision, the Office denied appellant's January 2007 request for further review of the merits of his claim.

In support of his January 2007 reconsideration request, appellant resubmitted a January 10, 2003 report of Dr. Elbaor, an attending Board-certified orthopedic surgeon. The submission of this report would not require reopening appellant's claim for further merit review because it is duplicative of evidence previously submitted and already considered by the Office.¹¹

Appellant also submitted a January 5, 2007 report in which Dr. Elbaor stated that he saw appellant on October 2, 2002 for "an on-the-job injury to his great left toe" which he diagnosed as "trauma left foot, rule out tarsal tunnel syndrome," but that he changed the diagnosis to left hallux rigidus after a January 10, 2003 examination. The Board finds that the submission of this report does not require reopening appellant's claim for further merit review because it is not relevant to the underlying issue of the present case, *i.e.*, whether appellant established that he sustained a recurrence of disability on or after June 15, 2002 due to his August 23, 2001 employment injury.¹² Dr. Elbaor merely indicated that he changed his diagnosis of appellant's left foot condition. He did not provide any indication that appellant sustained disability due to his August 23, 2001 employment injury on or after June 15, 2002.

Appellant has not established that the Office improperly denied his request for further review of the merits of its December 14, 2004 decision under section 8128(a) of the Act, because the evidence and argument he submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.¹³

⁸ 20 C.F.R. § 10.608(b).

⁹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁰ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹¹ *See supra* note 9 and accompanying text.

¹² *See supra* note 10 and accompanying text.

¹³ On appeal to the Board, appellant argued that he sustained disability on and after June 15, 2002 due to a new occupational injury to his left toe. The Board notes that the record does not contain a final decision regarding this matter within the Board's jurisdiction and it is not the subject of the present appeal. *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

CONCLUSION

The Board finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 20, 2007 decision is affirmed.

Issued: December 11, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board